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U.S. Department of Energy,

1 [Attached is testimony in opposition to a nuclear waste facility at Yucca Mountain submitted by the Indigenous Law Institute, January 10, 2008.]

Sincerely,

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INDIGENOUS LAW INSTITUTE STATEMENT

IN OPPOSITION TO THE UNITED STATES GOVERNMENT'S USE OF

WESTERN SHOSHONE YUCCA MOUNTAIN

AS A NUCLEAR WASTE REPOSITORY

by Steven Newcomb

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Introduction

This testimony is intended to dovetail with Mr. Ian Zabarte's 03 December 2007 testimony for the Western Shoshone National Council opposing the placement of a nuclear waste facility in Yucca Mountain. Mr. Zabarte did an excellent job of identifying documents in the historical record that lead to the unavoidable conclusion that the territory where Yucca Mountain is located still rightfully belongs to the Western Shoshone Nation. This conclusion is premised on the 1787 Northwest Ordinance, the 1861 Nevada Territorial Act, and the 1863 Treaty of Ruby Valley. However, the United States government is disinclined to acknowledge that the lands identified in Article V of the Treaty of Ruby Valley, including the area of Yucca Mountain, still belong to the Western Shoshone Nation, or that the Western Shoshone people are the ones who have the right to ultimately decide whether or not a nuclear waste repository ought to be built in their sacred Yucca Mountain within their national territory. The first part of this Indigenous Law Institute statement in opposition to a nuclear waste facility at Yucca Mountain is intended to document that a categorical dichotomy between "Christian people" and "heathens" in U.S. law is being currently and covertly used by the United States government against the Western Shoshone Nation, in violation of the presumed separation of church and state, and in violation of the tenet that Christianity is not to be preferred in U.S. law over other religious traditions. This religious dichotomy between "Christian people" and "heathens" is found in the 1823 U.S. Supreme Court precedent *Johnson & Grahame's Lessee* v. *M'Intosh*. In keeping with the *Johnson* ruling, the United States is illegally occupying the vast majority of Western Shoshone lands on the

basis of Christianity, and the Doctrine of Christian Discovery and Dominion. It is on this religious basis that the United States today claims the right to use Western Shoshone lands for its own purposes, such as for a nuclear waste facility, against the wishes of, and without ever obtaining permission from, the rightful owner of those lands, namely, the Western Shoshone Nation.

Interpreting the Treaty of Ruby Valley

In 1863, the United States of America made a treaty with the Western Shoshone Indians, in the region known as the Great Basin of North America. The Western Shoshone were free and independent when they made the Treaty of Ruby Valley with the United States. A treaty document contains terms of agreement between two or more free and independent nations, and specifies the nature of the relations that will exist between the nations entering into the treaty. However, a treaty made between the United States and an American Indian nation is problematic because the terms specified in the treaty were written in technical English by United States government officials. There is no copy of the Ruby Valley Treaty in the Western Shoshone language that would take into consideration Western Shoshone cultural and spiritual sensibilities with regard to their lands, including with their norms and values. The English wording of the treaty is therefore biased in favor of the United States government. Thus the question arises, "How shall we interpret the Ruby Valley Treaty?"

In 2001, United States government representatives were asked specifically by the United Nations Committee on the Elimination of Racial Discrimination to explain the U.S. position on its 1863 Treaty with the Western Shoshone. The United States responded by saying:

> As is the case with the Shoshone, many Native American tribal land claims are based on aboriginal title that creates enforceable property rights in tribes against third parties or states. The doctrine of aboriginal title is a judicially created doctrine rooted in colonial concepts of property ownership that arose from conflicting claims between the European colonists and Native Americans over land which was lightly populated due to the migratory nature of some Indian lifestyles. The claims were first addressed in the U.S. Supreme Court decision *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823), which held that as a result of European discovery, the Native Americans had a right to occupancy and possession, but that tribal rights to complete sovereignty were necessarily diminished by the principle that discovery gave exclusive title to those who made it.[1]

What the U.S. representatives did not explain to the UN CERD is that, by means of the *Johnson* ruling, the U.S. Supreme Court expressed what I prefer to call "the Doctrine of Christian Discovery and Dominion." I prefer this terminology because of the religious background of the *Johnson* decision. That religious background is traceable to the Old Testament narrative of the "chosen people" and the "promised land," and to fifteenth century Vatican documents of subjugation. Justice Joseph Story, who was seated on the Supreme Court at the time the *Johnson* ruling was handed down, drew a direct connection between that ruling, the doctrine of discovery, and a Vatican document issued by Pope Alexander VI in 1493, known as the *Inter Caetera* papal bull, which is connected to many other such documents of discovery, conquest, and crusade.

In his book "Commentaries on the Constitution of the United States," Justice Story identified the *Inter Caetera* bull as the origin of the doctrine of discovery that his

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[1] See testimony of Lorne W. Craner, assistant secretary of state for the Bureau of Democracy, Human Rights, and Labor; Ralph F. Boyd, Jr., assistant U.S. attorney general, "Reply of the United States to Questions from the UN Committee on the Elimination of Racial Discrimination," Geneva, Switzerland, Aug. 6, 2001, at U.S. State Department website.

friend and mentor Chief Justice John Marshall had incorporated into the *Johnson* ruling. As Story stated:

> Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.
>
> The principle, then, *that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments,*[2] being once established [by the Pope], it followed as a matter of course, that every government within the limits of its discoveries excluded all other person from any right to acquire the soil by any grant whatsoever from the natives. No nation would suffer either its own subjects or those of any other nation to set up or vindicate any such title. It was deemed a right exclusively belonging to the government in its *sovereign* capacity to extinguish the Indian title, and perfect its own *dominion* over the soil, and dispose of it according to its own good pleasure. (emphasis added).

Notice above that Story conceptualized the "discovering" government as a "sovereign" with its "own dominion over the soil," which it had the right "perfect" by exercising its "sovereign capacity to extinguish the Indian title." According to this theory, the "discovering" Christian European government is understood to have dominion over the soil even before physical possession is taken and before any "Indian title" has been extinguished. It became the view of some Europeans commentators that, if the lands in question were not "possessed by any Christian prince" at the time of their supposed "discovery" then, according to the international law customary to Christendom, the Christian sovereign prince was understood, from the perspective of Christendom, to automatically obtain "sovereignty" and "dominion" over the soil inhabited and possessed by non-Christians (or what Marshall referred to in the *Johnson* ruling as "heathens"). The

[2] The italicized language is the wording that Story lifted verbatim from the *Johnson* ruling, without attribution and without quotation marks. Marshall's language in the *Johnson* decision is, "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."

Christian monarch's charge was to *perfect* its "sovereignty" and "dominion" by gradually taking physical possession of the soil. This political sovereignty and dominion—or in Christendom's feudal parlance, "Lordship"—could be transferred by international agreement from one monarchy or government of Christendom to another.

Thus, what the U.S. representatives characterized to the CERD as a "judicially created doctrine" of "aboriginal title"(otherwise known as "Indian title") is conceived of in U.S. law as a form of title subject to the sovereignty and dominion of the first Christian discoverer or its political and legal successor, such as the United States. As two former Deputy Attorney Generals for the State of California expressed the matter in a 1986 law review article: "Aboriginal title or Indian title is a permissive right of occupancy recognized by the sovereign in the original possessors of the land."[3] In support of their definition, the authors turned to the *Johnson* ruling: "In *Johnson* v. McIntosh, the classical statement of this principle, Chief Justice Marshall explained the theory of aboriginal title:

> In the establishment of these relations [between the discoverer and natives], the rights of the original inhabitants were in no instance entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but *their rights to complete sovereignty, as independent nations, were, necessarily diminished,*[4] and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied *by the original fundamental principle, that discovery gave exclusive title to those who made it.*[5]
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in

[3] Bruce S. Flushman and Joe Barbieri, "Aboriginal Indian Title: The Special Case of California, Pacific Law Journal, Vol. 17, 391-460, at 392.
[4] Notice that the italicized wording are the same words cited by the U.S. representatives to the CERD.
[5] This italics shows the causative agency that supposedly "diminished" Indian "rights to complete sovereignty, as independent nations." That causative agency is the judicial conceptualization that "discovery" by "Christian people" (to use the Court's own repeated phrasing in the ruling with reference to the royal charters of England) of lands inhabited by "heathens" "gave exclusive title to those who made it [the 'discovery']."

> themselves; and claimed, and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy . . .

According to Professor Steven L. Winter, in his book "A Clearing in the Forest: Law, Life, and Mind," (University of Chicago Press, 2001), "context, function, and purpose are built-in constitutive dimensions of categorization by means of idealized cognitive models." (p. 190). Winter identifies a cognitive model as a "folk theory" or "cultural understanding that organizes knowledge of events, people, objects, and their characteristic relationships in a single gestalt structure that is experientially meaningful as a whole." The *Johnson* ruling, with its Doctrine of Christian Discovery and Dominion, is an example of such a gestalt (holistic) cognitive or mental structure.

The background *context* of the legal category "doctrine of discovery" (and related legal categories such as "Indian title" or "aboriginal title") is the mentality, social activities, and cultural orientation of ancient Christendom; a *function* of the "doctrine of discovery" is to provide what Chief Justice Marshall referred to as "an apology" (a rationalization) by the United States for considering the American Indians as being "a people over whom the superior genius or Europe might claim an ascendency [sic]"[6] ("ascendancy" is a synonym for "dominion"); a central *purpose* of the *Johnson* ruling and the doctrine of Christian discovery and dominion is to explain away the premise that the original indigenous nations of North American (such as the Western Shoshone nation), continue to possess "rights to complete sovereignty, as independent nations" with an ultimate right of decision-making within their own territory over projects such as the nuclear waste repository at the Western Shoshone spiritual area, Yucca Mountain. By

[6] *Johnson* at 573.

means of the *Johnson* ruling, the United States has tacitly institutionalized the categorization of American Indians as "heathens" in U.S. law, and now covertly uses this categorization as a basis for arguing that the Western Shoshones have only a "diminished sovereignty" and therefore do not have a right of territorial integrity within their own national boundaries as spelled out in the Treaty of Ruby Valley.

How the United States Frames the Western Shoshone Treaty of Ruby Valley

In keeping with the *Johnson* ruling, United States government officials today assume that Western Shoshone "rights to complete sovereignty, as an independent nation" were "diminished" by the "principle, that discovery gave exclusive title to those ["Christian people" or "Christian prince"] who made it" [the discovery]. From the viewpoint of the United States, this background assumption of diminished Indian sovereignty frames the Treaty of Ruby Valley on the premise that Indian lands, at the time of their "discovery," were, in keeping with the *Inter Caetera bull*, "not possessed by any Christian prince" (or, as Marshall explicitly termed it, by "Christian people"). Accordingly, the little noticed conception articulated in the *Johnson* ruling is that Christian "discovery *gave* title to the government, by whose subjects or by whose authority it [the discovery] was made, against all other European governments." Joseph Story expressed the matter by saying, "As infidels, heathens, and savages, they [the American Indians] were not allowed to possess the prerogatives belonging to completely sovereign, independent nations."

There is another way of phrasing Story's above comment in keeping with the *Johnson* decision: Because Western Shoshone ancestors were not baptized as Christians and did not believe in the Christian religion at the time of Christian-European

"discovery" (invasion), the Western Shoshones today are "not allowed" by the United States government "to possess the prerogatives belonging to completely sovereign, independent nations," prerogatives such as territorial integrity within the boundaries of their country as described in Article V of the Treaty of Ruby Valley where Yucca Mountain is located. In short, it is on the covert background basis of the Christian religion that the United States government claims a unilaterally right to decide that Yucca Mountain will be made into a huge repository for nuclear waste, without the permission of the Western Shoshone Nation, and in violation of their cultural and spiritual traditions.

Furthermore, it is in keeping with the premise of a "diminished" Indian sovereignty based on an invasive "discovery" by "Christian people" of "heathen" lands that the United States government mentally projects the concept "tribe" onto Indian nations and peoples. Politically, the concept "tribe" is a pejorative term in the English language as evidence by such phrases as, "tribal strife," "tribal conflict," "tribal bloodshed," "tribal warfare," and so forth. The concept "tribe" is not as strong politically as the concept nation, which is why it the United States prefers it. Moreover, when the concept "tribe" is framed as existing "within" the boundaries of a nation-state or political state such as the United States, an unconscious presumption is automatically made that the sovereign Indian "tribe" is lower in political status than the "sovereign" (namely, the United States governments), in keeping with the conceptions found in the *Johnson* ruling. An additional conceptions embedded in the *Johnson* decision is what Chief Justice John Marshall called, "the extravagant *pretension*" that the discovery by "Christian people" of a country inhabited by "heathens" is the same as the "conquest" of those inhabitants. The

United States, in other words, would *pretend* that "Christian discovery" is same as "conquest."

The Indian Claims Commission Process

Another argument made by U.S. government officials is that the Western Shoshones have already been paid for their lands by the United States. This claim is being made on the basis of the Indian Claims Commission that the United States formed in 1946 to bring all Indian land claims to "finality," or, in other words, to rid the United States of Indian lands claims once and for all. Importantly, the Indian Claims Commission Act required that a Final Report be sent to Congress at the end of any given investigation into a particular Indian "land claim." With regard to the Western Shoshone case, the Indian Claims Commission never sent a Final Report to Congress for Docket 326-K, informing that body of the ICCs findings in the Western Shoshone case.[7]

When the United States government filed its brief with the Supreme Court in U.S. v. Dann, it failed to inform the Court that the ICC had failed to complete the statutorily mandated process in the Western Shoshone case by filing a Final Report for Docket 326-K. Accordingly, in U.S. v. Dann, the Supreme Court stated:

> The Indian Claims Commission Act had two purposes. The "chief purpose of the [the Act] was to dispose of the Indian claims problem with finality." H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose [of finality] was effected by the language of Section 22(a): "*When the report of the Commission* determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims..." Section 22(a) also states that the "payment of any claim...shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

[7] See p. 125 of the Indian Claims Commission's "Final Report" to Congress, published in 1978 at the time the ICC went out of existence. The Final Report identifies 326-K as being a case never reported to Congress.

What the Supreme Court did not specify is a third "purpose" of the Indian Claims Commission process, which was expressed by President Truman when he signed the bill creating the ICC in the Oval Office. President Truman issued a press release from the White House in which he invoked the Northwest Ordinance. He found in that ordinance a tradition that he said was exemplified by the Indian Claims Commission. He said the Commission would demonstrate to the world that the United States had engaged in "fair and honorable dealings" with "tiny nations." In short, if the Supreme Court had taken President Truman's statement into consideration in U.S. v. Dann, the Court would have said that the "chief purpose of the Indian Claims Commission Act was to dispose of the Indian claims problem with finality" in a "fair and honorable" manner, something the United States has clearly failed to do from a Western Shoshone viewpoint.

Furthermore, Section 21 of the Indian Claims Commission Act specified the reason for a Final Report in every Indian "claims" case:

> Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress. The report to Congress shall contain 1) the final determination of the Commission. 2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and 3) a statement of how each Commissioner voted upon the final determination of the claim.

Based on the above language, the ICC had a clear statutory obligation to file a final report with Congress in the Western Shoshone case. Because the Commission failed to do so, finality was never achieved in the Western Shoshone case pursuant to the terms of the ICCA in a "fair and honorable" manner. Furthermore, Section 21 is wrapped up inside Section 22(a) of the ICCA. Section 22(a), in other words, is predicated on the statutory requirement that the Commission file a final report with Congress in any given case, such as that of the Western Shoshones.

This point was noted by the Court of Claims in a 1979 decision (Temoak Band of Western Shoshone Indians, 219 Ct. Cl. 346). The Court of Claims said quite clearly,

> [in a previous ruling] we pointed out that by Section 22 of Act, 25 U.S.C. 7, *the United States would not be discharged of any claim,* including one that the Western Shoshones owned the land, *until the judgment was reported to Congress*, money paid and appropriated, and payment made. (352) (emphasis added).

Based on the above reasoning by the Court of Claims, given that the ICC never "reported" its "judgment" to Congress in Docket 326-K, indicating to that body its "Final Determination," and "a transcript of the proceedings or judgment upon review," as well as a statement of how each Commission voted upon the final determination of the claim," it therefore follows that the United States has not been discharged of the "claim" that the Western Shoshones own the land described in Article V of the 1863 Treaty of Ruby Valley, within which the Western Shoshones sacred Yucca Mountain is located. An extensive report on the issue of payment is found in the Appendix of this document.

State v M'Kenney

In 1883, the Supreme Court of Nevada handed down its decision in the case *State ex rel. Truman, Dist. Atty., etc.,* v. *M'Kenny, Judge, etc.* (18 Nev. 182). The case dealt with a Shoshone Indian who had killed a woman "of the same tribe." The "tribe," said the court, is recognized and treated with by the [U.S.] government. Both Indians at the time of the killing were living "under the authority and subjection of...tribal laws." The court held that "the courts of this state, under its general criminal laws, have no jurisdiction of the offense, nor can they have [such jurisdiction] without an affirmative act of the legislature, or a self-acting clause of the [state] constitution."

The court further explained that because Nevada had been "admitted as a state, on an equal footing in all respects with the other states [of the Union], the United States courts would have no jurisdiction of the crime; *and since our organic act provides that the rights of person or property now pertaining to the Indians shall not be impaired, so long as they remain unextinguished by treaty between the United States and such Indians, it follows that the authorities of the tribe alone have the right to take cognizance of the crime.*" (emphasis added).

In *Lynch* v. *Household Finance Corporation* 405 U.S. 538 (1972), Justice Stewart, writing for the majority, stated: "...the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right...In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other..."

When we apply Justice Stewart's reasoning to the organic act that organized the Territory of Nevada, and the specific language declaring "that the rights of person or property now pertaining to the Indians shall not be impaired, so long as they [those rights] remain unextinguished," we are able to draw a similar conclusion: any dichotomy between the natural liberty of the Indians and their property rights to their ancestral lands is a false one.

As Justice Stewart correctly pointed out, the phrase "rights of person or property" is not meant to suggest that property has rights. To borrow from the reasoning in *Lynch*, the Nevada territorial act acknowledges that the Indians have "the right to enjoy property

without unlawful deprivation," so long as the Indians do not extinguish their rights by treaty. For Indians, as for all human beings, the most essential form of property has always been land; and any discussion of Indian liberty is meaningless without them being secure on a land base of their own where they can live together as a free nation, with their own language and culture, in keeping with their own laws.

Of the Indians, the Supreme Court of Nevada said in *State* v. *M'Kenney*: "They claimed the right of self-government in matters pertaining to themselves, and did not desire to become part of the body politic [of the United States]. They have had laws and chiefs of their own making and choosing, and their right to have them has been recognized by the constitution, the laws and treaties of congress, and the decisions of courts. Such was their condition when our organic act [establishing the territory of Nevada] was passed; and under the circumstances stated, if congress intended to permit the territory to do away with their cherished customs, to declare as to themselves what acts should constitute crimes, and prescribe punishments for the same, then it inserted, in a most important instrument, words which utterly failed to express its meaning."

After pointing out that the organic act "*said* that all rights of person and property *then pertaining* to the Indians of the territory should not be impaired so long as such rights should remain unextinguished by treaty...," the Supreme Court of Nevada posed the question, "What rights of person and property did congress intend to preserve unimpaired?" The court answered, "Evidently not those [rights] alone which had been established by treaty, because all the Indians in the territory were included in the protecting clause, and not all the tribes has treaty rights. So far as we are advised, the first

treaty with the Shoshones in Nevada was concluded in 1863," and the organic territorial act was passed in 1861.

There is another clause in "An Act to organize the Territory of Nevada" that ought to be mentioned here. The act is framed in such as way as to say "That nothing in this act contained shall be construed...to include any territory which, by treaty, with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Nevada, until said tribe shall signify their assent to the President of the United States to be included within said Territory..."

What specific rights of person or property were pertaining to the Indians and not to be impaired so long as such rights remained unextinguished by treaty between the United States and such Indians? What property rights were pertaining to the Western Shoshones that congress said were to remain unimpaired so long as such rights remained unextinguished by treaty between the United States and the Western Shoshones? In addition to their ancestral lands, the Indians' *liberty* and *independence* were an integral part of the rights and property pertaining to the Indians.

As the Supreme Court of Nevada said in *State* v. *M'Kenney*, after passage of the fourteenth amendment, the United States "never claimed or pretended that they [the Indians] had lost their respective nationalities, their right to govern themselves, the immunity which belongs to nations in the conduct of war, or any other attributes of a separate political community." Thus, the attributes of a separate and independent political community or nationality were part of the property pertaining to the Western

Shoshones when Congress passed the Nevada territorial act in 1861. Indeed, "...the Indians, in tribal condition have never been subject to the jurisdiction of the United States, in the sense in which the term 'jurisdiction' is employed in the fourteenth amendment to the constitution."

The Original Independence of the Western Shoshone Nation

The United States today chooses to ignore the original political existence of the Western Shoshone—which the U.S. Supreme Court categorized, along with that of all other Indian nations, one of independence. In *Worcester* v. *Georgia*, 6 Pet., 515, 1832, Chief Justice Marshall was unambiguous when he said:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, *divided into separate nations, independent of each other and of the rest of the world* (at 542). (emphasis added)

John Marshall also identified the independence of the Indians living within the area of the Louisiana Purchase, for example, as "a country almost entirely occupied by numerous tribes of Indians, *who are in fact independent*" (at 587). (emphasis added) As acknowledged in the in *Worcester*, at the time that they made a treaty with the United States, the Western Shoshone were free and independent of all other Indian nations, of the United States, and of the rest of the world. Seven years before the Treaty of Ruby Valley was made, Justice Taney wrote in *Dred Scott* v. *Sandford* (19 Howard) 393 (1857)::

> ...although they [the Indians] were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were

situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it so long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, so much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who composed these Indian political communities have always been treated as foreigners not living under our Government. (at 403-404).

Justice Joseph Story, in his "Commentaries on the Constitution of the United States" (1833)(1871 edition, Thomas M. Cooley ed., pp. 6-7 § 3), noted that the American Indians steadfastly maintained their spirit of independence, and "asserted a plenary right of dominion over their respective territories":

There is no doubt, that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil. They

> acknowledged no obedience, or allegiance, or subordination to any foreign sovereign whatsoever; as far as they have possessed the means, they have ever since asserted this plenary right of dominion, and yielded it up only when lost by the superior force of conquest, or transferred by a voluntary cession.

Philosopher John Locke wrote that, "Men being, as has been said, by Nature, all free, equal, and independent, no one can be put out of his Estate, and subjected to the political Power of another, without his own Consent." John Locke, *The Second Treatise on Civil Government*, Ch. VIII, § 95 (1690). Expanding the scope of Locke's statement to apply this principle to "*distinct and originally independent*" indigenous "*nations*" and "*peoples,*" yields a clear understanding of the right of self-determination and territoriality that all originally free and independent American Indian nations still possess.

In *U.S.* v. *Winans* 163 U.S. 371, 1905, the Supreme Court said that an Indian "treaty was not a grant of rights *to* the Indians, but *a grant of rights from them*—a reservation of those [rights] not granted." (emphasis added) As the eminent scholar Vine Deloria, Jr. concludes: "This doctrine means that unless a specific subject matter becomes part of the negotiations and [unless] the exercise of powers relating to it is allocated to the United States...the subject matter and the power to deal with it remain with the Indians...The treaty or agreement with the Indians thus has precisely the same effect on the relationship of the Indians to the United States as does the Tenth Amendment to the Constitution, which states: 'The powers not delegated to the United States, are reserved to the States, respectively, or to the people.'"

Because a surrender or relinquishment of the *original independence* and territory of the Western Shoshone were not part of the negotiations that resulted in the Treaty of Ruby Valley, this means that Western Shoshone original independence and territory "remains with the Indians." Given that the Western Shoshone never delegated their original independence or their territory to the United States, by treaty or otherwise, the Western Shoshones retain to this day their inherent right of original independence and territorial integrity.

The issue of treaty interpretation is a key part of the United States' argument that, the Treaty of Ruby Valley did "not acknowledge ownership or any other rights in favor of the Western Shoshone." This statement is made only from the point of view of the United States and not from the perspective of the Western Shoshone themselves, regarding the Treaty of Ruby Valley. The United States takes the view that Indian treaties are to be interpreted as the United States understood an Indian treaty at the time it was signed, which is the reverse of two well settled principles of treaty interpretation in federal Indian law: "Indian treaties must be interpreted as the Indians themselves would have understood them"; and, "Indian treaties are to be liberally construed in favor of the Indians." Based on these two rules of Indian treaty interpretation the traditional Western Shoshones make the following point: "Our Western Shoshone ancestors, who made the Treaty of Ruby Valley with the United States, did not understand the treaty to mean that the Western Shoshone were surrendering their original independence or their ancestral territory." Put differently, an interpretation of the Ruby Valley treaty, as the Western Shoshone understood the terms of the treaty when it was made, leads unavoidably to the

following conclusion: The Western Shoshone did not surrender or relinquish their original independence or their ancestral homeland to the United States.

The United States' claim that the Ruby Valley treaty did not acknowledge ownership or any other rights in the Western Shoshones fails to recognize that a treaty is an agreement made between two or more *independent* nations. To say that a treaty can be made between two independent nations without each recognizing and acknowledging the existence and territory of the other subverts the very meaning of the terms "nation" and "treaty." As Chief Justice Marshall said in *Worcester* v. *Georgia*:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer or the coast of the particular region claimed ; and this was a restriction which those Europeans imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers that are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legis-

> lative proceedings by ourselves, having a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

A nation is "a community of people composed of one or more nationalities and *possessing a more or less defined territory* and government." In other words, the expressions "Shoshone Nation," or the "Western Shoshone Nation," are, in keeping with the 1861 Act to establish the Territory of Nevada, correctly interpreted to mean "a community living independently, *in its own territory*, under its own laws, and not subject to the laws of the United States." By making a "treaty" known as "the Ruby Valley Treaty," the United States government pronounced, acknowledged and recognized the Shoshone Nation, and the Western Bands of the Shoshone Nation, which means that the United States thereby recognized the *national character* of the Shoshone, a meaning that the United States cannot logically evade. No treaty document that does not have the dignity or effect of a treaty between two or more *independent nations* can be sent to the United States Senate for ratification within the scope of the Constitution's treaty making power.

In Turner v. American Baptist Missionary Union (24 Fed. Cas. No. 14251 (C.C. Mich. 1852)), a Michigan federal district court dismissed the argument that Indian treaties are different than those made with foreign and independent countries:

> It is contended that a treaty with Indian tribes has not the same dignity or effect as a treaty with a foreign and independent nation. This distinction is not authorized by the constitution. Since the commence-

ment of the government treaties have been made with the Indians, and the treaty-making power has been exercise in making them. They are treaties, within the meaning of the constitution, and as such are the supreme laws of the land.

Based on the above ruling, the eminent scholar Vine Deloria, Jr. concluded: "Thus, whatever other arguments might be made by the people seeking to dilute Indian rights, attacking the right articulated by a treaty or agreement is not within the realm of legality."

According to the Supremacy Clause of the U.S. Constitution, "treaties made, and that shall be made, shall be the supreme Law of the land." Every Western Shoshone is a successor in interest to the Ruby Valley Treaty, which, according to Judge Thompson of the U.S. District Court for the District of Nevada, the U.S. government said in1986 is "in full force and effect. " Thus, the Western Shoshones, by opposing a nuclear waste facility at Yucca Mountain, are asserting their own ancestral birthright.

The United States fail to acknowledge that the conduct of the United States treaty making with Indian nations constitutes a framework of acknowledgment that recognized the independent nature and character of the Indian nations, their rights, and territories. As Chief Justice Marshall said in *Worcester* v. *Georgia*: "From the commencement of our Government Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and

having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." This framework of United States recognition of Indian nations and Indian property is well reflected in "An Act to organize the Territory of Nevada" (1861), which states:

> *Provided further*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such [Indian] rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or Territory; *but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Nevada, until said tribe shall signify their assent to the President of the United States to be included within the said Territory*... (emphasis added).

The United States has failed to point to any document by which the Western Shoshone ever signified "their assent to the President of the United States to be included within the said Territory" of Nevada. The language of the act establishing the Territory of Nevada followed the language of the 1787 Northwest Ordinance, in which Congress pledged: "The utmost good faith shall always be observed towards the Indian; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed—but laws founded in justice

and humanity shall from time to time be made, for wrongs being done to them, and for preserving peace and friendship with them."

Furthermore, in February 1862, the Secretary of the Interior wrote to the chairman of the House Committee on Indian Affairs, stating that the lands in the Utah Territory were "owned by the Indians." Because not much of the land was "fit for cultivation," the Secretary of the Interior said it would not be "required for settlement for many years." For this reason, the Secretary of the Interior did not recommend purchasing the land from the Indians at that time. As a result, the House Committee on Indian Affairs recommended to Congress that it authorize the negotiation of a treaty for passage through the land claimed by the Shoshone, *but to not try to purchase the land.*

Conclusion

The lands where the United States plans to build a nuclear waste facility at Yucca Mountain still rightfully belong to the Western Shoshone Nation. The traditional Western Shoshone do not want a nuclear waste facility on their lands and they have not given permission to the United States to build such a facility. For its part, the United State government has orchestrated the wrongful appearance that Western Shoshone land rights have been extinguished by the Indian Claims Commission process (by the U.S. paying itself "on behalf of the Western Shoshone), despite the fact that Congress has never abrogated the 1863 Treaty of Ruby Valley. In their 2001 testimony before the U.N. Committee on the Elimination of Racial Discrimination, U.S. representatives declared: "Indian treaties can be abrogated by Congress, if Congress clearly expresses an intent to do so. The United States Supreme Court has adopted several special canons of construction for Indian treaties, which, taken together, create a strong presumption that

treaty rights have not been modified by subsequent congressional enactments. These rules, variously stated, establish that Congress must show a "clear and plain" intention to abrogate Indian treaty rights before any Congressional action will be determined to have abrogated such rights." (p. 2) Congress has never shown a "clear and plain" intention to abrogate the Treaty of Ruby Valley.

As quoted above, a Michigan federal district court declared: "It is contended that a treaty with Indian tribes has not the same dignity or effect as a treaty with a foreign and independent nation. This distinction is not authorized by the constitution." In direct contradiction to this judicial observation, U.S. representatives stated to the CERD: "The United States Supreme Court has held that 'the power to make treaties with the Indian Tribes is, as we have seen, coextensive with that to make treaties with foreign nations.' United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876). That said, while Indian treaties often recognize the sovereignty of Indian tribes, Indian treaties differ from foreign treaties." Thus, the U.S. representatives to the C.E.R.D. made the very distinction between "a treaty with Indian tribes" and the "dignity and effect" of "a treaty with a foreign and independent nation" that the Michigan federal district court said "is not authorized by the constitution." What was the basis for this distinction in the minds of the U.S. representatives? "Under U.S. law, Indian tribes are 'domestic dependent nations."

And what did the U.S. representatives say to the C.E.R.D. regarding the interpretation of Indian treaties with the United States? "There is a special trust relationship between these nations and the United States. There are likewise special canons of construction, recognized and utilized by the United States Supreme Court, that require that Indian treaties be construed in favor of the Indians." However, when it comes

to interpreting the Treaty of Ruby Valley, the United States does the exact opposite of what it told the C.E.R.D. The United States interprets the 1863 Treaty in favor of the United States, to the detriment of the Western Shoshone nation, as evidenced by U.S. plans to build a nuclear waste facility at Yucca Mountain without the permission of the Western Shoshone Nation, and against the cultural and spiritual sensibilities of the traditional Western Shoshone people.

Appendix

Failure of the United States Indian Claims Commission to File a Report with Congress in the Western Shoshone Case (Docket 326-K), Pursuant to Sections 21 and 22(a) of the Indian Claims Commission Act

A Report

Prepared on Behalf of the Western Shoshone National Council

by

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Summary

The failure of the Indian Claims Commission to file a Final Report with Congress in the Western Shoshone case, Docket 326-K demonstrates that the United States government failed to reach finality in the Western Shoshone case, pursuant to the statutory requirements of the Indian Claims Commission Act. Section 21 of the Indian Claims Commission Act (ICCA) required the Indian Claims Commission to promptly file a report with Congress when it completed a given case. However, the Commission never carried out this legislative requirement in the Western Shoshone case.

Thus, the statutory basis for a Western Shoshone monetary distribution of Docket 326-K now stands challenged by the failure of the Indian Claims Commission to fulfill its obligations in the Western Shoshone case, as required by the very statute that brought the Commission into existence.

This failure calls into question the basis of Senate bill 958 (sponsored by Senators Reid and Ensign), and H.R. 2851 (sponsored by Congressman Gibbons) that would distribute nearly $140 million to the Western Shoshone Indians, as compensation for Western Shoshone lands supposedly taken by the United States without the consent of the Western Shoshone people.

Failure of the Indian Claims Commission to File a Report with Congress

On September 30, 1978, Congress dissolved the Indian Claims Commission. In 1979 the ICC's "Final Report" to Congress was published. This report includes a chart on page 125: "Fiscal Year Totals of Dockets Completed and Awards." In a footnote that accompanies the chart, we find the Commission's acknowledgment that out of the 324 dockets shown as completed by awards, 20 of these dockets were "*not reported to Congress as completed.*" (emphasis added). This same information is also found H.D. Rosenthal's *Their Day in Court*: *A History of The Indian Claims Commission* (1990), on pages 266-67).

Western Shoshone docket 326-K is listed in the ICC's "Final Report" as one of the dockets "not reported to Congress" because the case was still on appeals (by both the U.S. government and the traditional Western Shoshone) before the Court of Claims when the Indian Claims Commission went out of existence.

Although the ICC issued a Final Award judgment in the Western Shoshone case, this did not end its statutory responsibility in the case. The Commission was still required to file its report with Congress. This requirement is spelled out in Section 21 of the Indian Claims Commission Act, "Report of Commission to Congress," which reads as follows:

> Sec. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.
>
> The report to Congress shall contain 1) the final determination of the Commission; 2) a transcript of the proceedings or judgment

> Upon review, if any, with the instructions of the Court of Claims; and 3) a statement of how each Commissioner voted upon the final determination of the claim.

Based on Section 21 of the ICC Act, the Indian Claims Commission had a clear and explicit statutory obligation to file a final report with Congress in the Western Shoshone case. Because the Commission failed to do so, finality was never achieved in the Western Shoshone case pursuant to the terms of the ICC Act.

Section 22 of the ICC Act explains the "Effect of Final Determination of Commission."

> Sec. 22. (a) *When the report of the Commission* determining any Claimant to be entitled to recover *has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims*, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission. (emphasis added).

Section 21 is wrapped up inside Section 22(a) of the Indian Claims Commission Act. In other words, Section 22(a) rests on the statutory requirement that the Commission file its report with Congress when it completed any given case.

This point was noted by the Court of Claims in a 1979 decision (Temoak Band of Western Shoshone Indians, 219 Ct. Cl. 346). The Court of Claims said quite clearly:

> [in a previous ruling] we pointed out that by Section 22 of Act, 25 U.S.C. Section 70u, *the United States would not be discharged of any claim*, including one that the Western Shoshones owned the land, *until the judgment was reported to Congress*, money to pay it appropriated, and payment made. (352) (emphasis added).

Thus, according to the Court of Claims, the report of the Commission's judgment to Congress was an essential requirement, based on the ICC Act, for the United States to be "discharged of any claim" including the claim that the Western Shoshones still own the unsettled land within the boundaries described in the 1863 Treaty of Ruby Valley. However, the Court of Claims did not address, as a factual matter, whether the Indian Claims Commission had filed, as required by statute, its report with Congress in the Western Shoshone case.

In U.S. v. Dann (572 F. 2d 222 (1978), the Ninth Circuit Court of Appeals pointed out that, "Claims before the ICC proceeded in three steps: decision whether the claimant Indians had ever had title to the land for which they are seeking compensation; establishment of the value of the lands claimed to have been taken as of the time of taking; and a determination of any offsets against the Indians by the Government."

The Ninth Circuit Court of Appeals further said that the 1962 order of the ICC in the Western Shoshone case "is not deemed a final judgment within the meaning of the ICC

Act. *'Finality' for this purpose does not attach until the Commission has filed its report with Congress* and the Indians have actually been paid the compensation owed them." (p. 226) (emphasis added). Importantly, the Ninth Circuit did not address, as a factual matter, whether the Indian Claims Commission had ever filed "its report with Congress" in the Western Shoshone case.

The U.S. government's brief, filed with the Supreme Court in U.S. v. Dann (470 U.S., 1984), reads in part as follows:

> "STATUTE INVOLVED
>
> Section 22 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, 25 U.S.C. (1976 ed.) 70u n1 provides:
>
> (a) When the report of the commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission."

The above reference to "final determination" in the U.S. government's brief is defined in Section 19 of the ICC Act, which reads as follows:

> The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include 1) its findings of the facts upon which its conclusions are based; 2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement for its reasons for its findings and conclusions.

And, as noted above, the Commission's final determination was to be included in its report to Congress.

In 1985, the Supreme Court noted in *U.S.* v. *Dann*:

> The Indian Claims Commission Act had two purposes. The "chief purpose of the [Act was] to dispose of the Indian claims problem with finality." H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose [of finality] was effected the language of Section 22(a): "*When the report of the Commission* determining any claimant to be entitled to recover *has been filed with Congress*, such report shall have the effect of a final judgment of the Court of Claims...." Section 22(a) also states that the "payment of any claim...shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." (p. 45) (emphasis added).

According to the Supreme Court's reading of Section 22(a), the Commission's filing of a report with Congress is one of two ingredients necessary to "effect" [achieve or accomplish] finality in a given Indian Claims Commission case, payment being the second ingredient.

Notably, although it mentioned the reporting requirement of the ICC Act, the Court never did address, as a factual matter, the specific question of whether the Commission had actually filed its report with Congress in the Western Shoshone case.

Instead, the Court limited itself in *U.S.* v. *Dann* to only the second ingredient of "finality" in an Indian Claims Commission case, namely, the legal issue of whether payment had been made to the Western Shoshone Indians pursuant to Section 22(a) of the ICC Act.

The Court was clearly aware that the Commission's report with Congress was an essential and statutorily required aspect of "finality" in any given Indian Claims Commission case. Thus, the Court's failure to address, as a factual matter, the question of whether the Commission had indeed filed such a report with Congress in the Western Shoshone case, is presumptive that the Court had not discovered at the time of its ruling in *U.S.* v. *Dann* that the Commission never filed its report with Congress.

Conclusion

The Final Report of the ICC tells us for a certainty that the Indian Claims Commission failed to fulfill the reporting requirement of Section 22(a) of the Indian Claims Commission Act in the Western Shoshone case. As already mentioned above, Section 22(a) of the ICC Act specified the two ingredients necessary for the Indian Claims Commission to reach "finality" in any given case. One ingredient was the Commission's report of its final determination and judgment to Congress. The second ingredient was payment to the Indians of the compensation owed to them. The United States Supreme Court in the 1985 ruling *U.S.* v. *Dann* failed to discover that the ICC had never been able to fulfill the first reporting ingredient of "finality" in the Western Shoshone case, thus resulting in an error of fact in the decision.

The implications of this new finding are indeed profound. The United States government has relied on the ruling in *U.S.* v. *Dann* to contend that the Western Shoshone are barred from raising the question of Western Shoshone title because of the ruling in *U.S.* v. *Dann* that the Western Shoshone were paid when the U.S. government paid itself on their behalf. However, such "finality" could only be reached in the Western Shoshone case if the Indian Claims Commission actually did file its report with Congress in the Western Shoshone case, and if the Western Shoshone were paid.

Suppose for a moment that we were willing to agree with the Supreme Court in *U.S.* v. *Dann* (which we are not) that the Western Shoshone were paid when the U.S. Treasury placed monies into an account in the name of the Western Shoshone (as wards of the federal government). This would still leave the reporting requirement of Section 22(a) of the Indian Claims Commission Act unfulfilled. Because the Indian Claims Commission

no longer exists, the reporting requirement of the ICC Act will forever remain unfulfilled by the Indian Claims Commission.

Any Western Shoshone monetary distribution bill must rest upon the statutory framework of the Indian Claims Commission Act. Pursuant to the ICC Act, any ICC monetary distribution bill must be premised upon the ICC having entirely completed its work to the point of "finality" as defined by Section 22(a) of the ICC Act. Because the Commission failed to do so in the Western Shoshone case, this means that there is not now and never will be a valid statutory basis for a Western Shoshone monetary distribution bill to be passed by Congress in accordance with the terms of the ICC Act.

The new finding outlined in this Report simply underlines the fact that negotiations will be the only way to resolve the impasse between the United States and the Western Shoshone Nation over disputed lands within the boundaries of the Treaty of Ruby Valley. An effort at negotiations was attempted during the Carter administration, but ultimately failed. Such negotiations must be immediately reopened in order for the United States and the Western Shoshone Nation to come terms with the Western Shoshone title and land rights.

A key starting point of any negotiation between the United States and the Western Shoshone will be the recognition in 1978 by the Ninth Circuit Court of Appeals that, "the title issue in this case was neither actually litigated nor actually decided in the proceedings before the ICC." (*United States* v. *Dann*, 572 F. 2d 222, 226). The United States government has been avoiding good faith negotiations with the Western Shoshone people by arguing that "finality" has been reached in the Western Shoshone case. By revealing that the Indian Claims Commission did not reach "finality" in the Western Shoshone case, the Commission's 1979 "Final Report" also reveals that the Western Shoshone title question still remains an open question.

Furthermore, in 1986, the U.S. District Court for the District of Nevada observed that, "the [U.S.] government has admitted that the 1863 Treaty of Ruby Valley is in full force and effect." (13 ILR 3158) As the supreme Law of the land pursuant to Article VI of the United States Constitution, the Ruby Valley Treaty ought to serve as an essential part of the basis of and framework for such negotiations between the United States and the Western Shoshone Nation.

We would like to remind the reader that on August 1, 1946, Secretary of Interior Krug wrote a letter to President Truman, recommending that the president sign the Indian Claims Commission Act into law. Krug told President Truman that that the bill had "international repercussions," and would come to be "viewed as a touchstone of the sincerity of our national professions of fair and honorable dealings toward *little nations*." (emphasis added) (Legislative History of the Indian Claims Commission Act of 1946, 1976, Clearwater Publishing Co.) The new finding revealed by this Report shows that United States now has the opportunity to demonstrate to the world community its willingness and its ability to engage in "fair and honorable dealings" with the Western Shoshone nation through good faith negotiations.

In a press release dated August 13, 1946, President Truman said that the Indian Claims Commission Act represented an effort to "remove a lingering discrimination against our First Americans" in order "to vindicate their property rights and contracts [e.g., treaties] in the courts against violations by the Federal Government itself." What makes Truman's words ironic is the way that the United States has for over thirty years refused to allow the Western Shoshone people to "vindicate their property rights" as a nation of people, and their treaty "contract" with the United States that describes the Western Shoshone national boundaries.

President Truman further said of the Indian Claims Commission Act: "This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes, we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights." May this pledge on the part of the U.S. government become the basis for the negotiations between the Western Shoshone Nation and the United States.

Finally, we end this Report with the following recommendations:

1) That the Senate Committee on Indian Affairs hold hearings on the slip shod manner in which the Indian Claims Commission dealt with Western Shoshone land rights.

2) That the Senate Committee on Indian Affairs not allow any Western Shoshone monetary distribution bill to be reintroduced during the upcoming congressional session for lack of a valid statutory basis for such a bill.

3) That the United States enter into negations with the Western Shoshone Nation in order to come up with a comprehensive and meaningful solution to the continuing dispute between the two nations over lands within the boundaries of the 1863 Treaty of Ruby Valley.

Appendix

On August 13, 1946, President Truman signed into law the United States Indian Claims Commission Act. The stated purpose of the legislation was to provide American Indians with an opportunity to sue the federal government of the United States for monetary compensation for Indian lands wrongfully taken by the United States at some time in the past. At the time, the U.S. government estimated that there were some $3 billion dollars in potential Indian claims against the United States. (Officials in the Justice Department bragged that they had been able to throw out some 98% of the claims brought by Indians against the United States).

Because American Indians were not citizens of the United States prior to the Indian Citizenship Act of 1924, Indians were not allowed to sue the U.S. government in the U.S.

Court of Claims. Before the Indian Claims Commission Act was signed into law in 1946, any Indian people that wanted to sue the United States had to go to Congress and petition for passage of a special jurisdictional act that would give them permission to sue the United States on a one time limited basis. This process was a problem for Indians as well as for the United States government.

Eventually, officials in the United States government (members of the House and Senate of the Congress, and officials of the Department of the Interior and the Department of Justice) agreed that a more systematic approach would be needed in order to put an end to Indian claims against the United States. It was decided that a Commission was needed that would take the burden off Congress by sifting through and investigating any Indian claims against the U.S., and deciding which claims had merit and which did not. It was decided that a specific deadline would be set up, and Indians would have to come forward and make a claim against the United States government by that deadline.

The Traditional Western Shoshone

On October 1, 1863, U.S. treaty commissioners signed a treaty of peace and friendship with eleven "Chiefs, Principal Men, and Warriors of the Western Bands of the Shoshone Nation." The Treaty of Ruby Valley was later ratified by the Senate of the United States in 1869, thereby making it "the supreme Law of the land," pursuant to Article VI of the U.S. Constitution.

The Ruby Valley treaty specified that whites could cross through Western Shoshone territory, build railroads, establish telegraph lines, set up ranches, and form mines within the Western Shoshone country.

The Treaty of Ruby Valley, however, was not a treaty of cession. That is, the Western Shoshone did not cede their lands to the United States by the terms of the Ruby Valley Treaty.

As the generations passed, the Western Shoshone elders continued to invoke the Ruby Valley Treaty's recognition of the boundaries of their ancestral lands. These traditional elders, particularly Muchach Temoak—the grandson of treaty signer, Chief Temoak—were willing to acknowledge that the Western Shoshone had conceded certain rights-of-way and easements to the United States and to white settlers. But these same traditional Western Shoshone leaders were also protective of Western Shoshone land rights and their traditional way of life. As authors Lieder and Page state in the book *Wild Justice*: *The People of Geronimo vs. the United States* (1997), "Few tribes in the continental United States have been as little disrupted by Anglo-Americans as the Western Shoshones" (p. 189).

In 1934, the United States established the Indian Reorganization Act (IRA), which allowed Indian communities to establish a corporate style tribal council government. A relatively small group of Western Shoshone people decided to establish an IRA style government system known as the Te-Moak Bands Tribe. The Indian Claims Commission

notified the Western Shoshone IRA system of the opportunity to file a claim against the United States. The traditional Western Shoshone, however, were never formally notified of the Indian Claims Commission process.

Wilkinson, Cragun, and Barker

After the Indian Claims Commission Act was passed, the law firm Wilkinson, Cragun, and Barker approached the IRA Western Shoshone Temoak Bands Tribe and encouraged the Tribe to filed a claim with the ICC as "the Western Shoshone identifiable group." In 1951 Wilkinson, Cragun, and Barker filed a claim on behalf of the Western Shoshone identifiable group, and the process began.

On October 16, 1962, the Indian Claims Commission issued a 30 page "Findings of Fact" having to do with Shoshone Indians generally. Only some 36 sentences of this "Findings" document had to do specifically with the Western Shoshone Indians.

Section 26 of this report reads:

> The Commission further finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Findings 22 and 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition, or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition of these lands by the United States. The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long ago prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.
> (11 Ind. Cl. Comm. 416)

Importantly, in the 30 pages of the ICC's "Findings of Fact" that served as the basis of the above statement, there is not one piece of historical information to support the Commission's claim of the "acquisition, disposition, or taking" of Western Shoshone lands by the United States. This is why the Commission also said, "For these reasons the Commission may not now definitely set the date of acquisition of these lands by the Untied States."

As Lieder and Page explain:

> ...Robert Barker, the attorney at Wilkinson, Cragun, and Barker in charge of the case, argued that all the Western Shoshones' lands had been taken.

> He didn't attempt to identify the dates of taking, an issue that, he believed, should be reserved for future proceedings. The government contented itself with arguing that the Shoshones had not met the requirements for proving aboriginal ownership and 'the United States could not take from them [the Western Shoshone] what they did not have.' Neither party introduced any evidence on the taking issue or analyzed the possibility that much of the land had never been taken. Apparently, Associate Commissioner Holt, who in 1962 delivered the Commission's opinion in the liability stage of the case, did not consider that possibility either. Rather, the Commission determined the extent of the Western Shoshones' aboriginal territory and concluded they were deprived of that land by the gradual encroachment of non-Indians and the gradual disposition of the land by the [federal] government. Identifying the crucial date when all these lands were magically transformed into a taking was left for future proceedings, which proved unnecessary. (*Wild Justice: The People of Geronimo vs. the United States*, p. 191)

The ICC was unable to "set the date of acquisition" because the Commissioners were going on the basis of their own personal conjecture and their historically unfounded assumption that the Western Shoshone lands had been taken from the Western Shoshone Indians.

It was as if the Commission were saying in its "Findings of Fact," "We know that the Western Shoshone lands were acquired, disposed of, or taken by the United States, we just don't know precisely when this occurred." Thus, the ICC "Findings" document said that "further proof" would be necessary "unless the parties" (the U.S. attorneys and the attorneys for the Indians) "may agree upon a date" when the alleged taking occurred. In other words, the Commission would need no historical documentation to support its "Findings" if the attorneys could come up with a gentleman's agreement or stipulation as to a date of "taking."

Had the Commissioners used historical documentation to come up with their "Findings" regarding the supposed taking of Western Shoshone lands by the United States, they would have made that historical documentation part of the record. They did not do so.

Indeed, in *Temoak Band of Western Shoshone Indians, Nevada* v. *U.S.* (593 F. 2d 994 (1979)), the Court of Claims admitted that the Western Shoshone case

> is one of many where the Commission was unable to discover any formal extinguishment of Indians' legal title, only gradual encroachment by settlers and others, and takings, the exact date of which could not be definitely set. (p. 996)

In an "Interlocutory Order" dated October 16, 1962, the Indian Claims Commission stated in part:

> That the Western Shoshone identifiable group exclusively used and

> occupied the lands described in Finding of Fact 23; that the Indian title to such of the lands of the Western Shoshone group as are located in the present State of California was extinguished on March 3, 1853; and that as to the remainder of the lands of the Western Shoshone, Indian title was extinguished by the gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of said lands by the Untied States for its own use and benefit, or the use and benefit of its citizens.

The "Interlocutory Order" concluded:

> IT IS THEREFORE ORDERED that the case proceed for the purpose of determining the acreage in each of the four areas involved; the consideration paid, if any; the dates of acquisition where necessary; and the market values thereof on the dates of acquisition.

Thus, instead of looking at the historical record and pinpointing specific actions on the part of the United States (or, say, white settlers) when the Western Shoshone lands were purportedly acquired, disposed of, or taken, the ICC decided to allow the attorneys of record to agree by stipulation upon a date acceptable to both parties. However, it is always important to keep in mind that the non-Indian attorneys of the firm Wilkinson, Cragun, and Barker, were the one's who made this stipulation with the U.S. attorneys. The Western Shoshone Indians themselves were not directly involved in the process leading up to the stipulation.

In an ICC document "Opinion of the Commission, dated October 11, 1972, the Commission described the stipulation as follows:

> By order of February 11, 1966, the Commission approved a joint stipulation of the plaintiffs and the defendant (U.S.) in Docket Nos. 326 and 367 as to the date of valuation of Western Shohsone lands. The stipulation provides:
>
> Counsel for both parties, having reviewed pertinent information relating to the time as of which the Western Shoshones lands in Nevada (Indian Claims Commission Finding No. 23) should be valued, hereby stipulate that the Nevada portion of the Western Shoshone lands in dockets 326 and 367 shall be valued as of July 1, 1872. (29 Ind. Cl. Comm. 7)

The abovementioned "order" of the Commission approving a joint stipulation is not available in the microfiche records of the Indian Claims Commission proceedings. Additionally, there is nothing in the record that indicates any specific "pertinent information" that had been reviewed by the non-Indian attorneys who came up with the stipulation.

Attempted Western Shoshone Intervention to Stop the Proceedings

In the 1960's, a group of traditional Western Shoshone formed the Western Shoshone Legal Defense and Education Association. In 1974, this organization attempted to intervene in the Indian Claims Commission proceedings pertaining to the Western Shoshone. The Western Shoshone interveners appealed to the ICC to exclude any unsettled Western Shoshone lands from the claim filed by Wilkinson, Cragun, and Barker in 1951. The Western Shoshone Legal Defense and Educational Association argued that all such unsettled Western Shoshone lands had never been taken by the United States, and, therefore, still rightfully belonged to the Western Shoshone.

For its part, the IRA Te-Moak Bands Tribe—led by attorney Robert Barker—opposed the legal action by the Western Shoshone Legal Defense and Education Association.

In 1975, the Indian Claims Commission ruled that the Western Shoshone opponents of the ICC proceedings had waited too long to file their petition. The ICC said that the Western Shoshone opponents could not stop or change the course of the proceedings unless they could prove that the process had been tainted by fraud, collusion, or laches. The Commission said that it found no such evidence and denied the Western Shoshone intervention.

Soon after the ICC's ruling against them, the Western Shoshone opponents of the ICC proceedings won political control of the Te-Moak Bands Tribe through a new election. In November 1976, the new leadership of the Te-Moak Bands Tribe fired Robert Barker as the attorney of record in the ICC proceedings. (Notably, the Bureau of Indian Affairs ruled that the Te-Moak Bands Tribe was not permitted to fire Barker).

With new legal representation, the Te-Moak Bands Tribal Council asked the Indian Claims Commission to suspend further proceedings in the case until the traditional Western Shoshone could attempt to enter negotiations with the United States government. The Commission refused to temporarily suspend its proceedings in the Western Shoshone case.

On August 15, 1977, the ICC handed down its "Opinion of the Commission" and "Final Award" in the Western Shoshone case. (40 Ind. Cl. Comm. 318, 453) And in December 1979, the Court of Claims reported the final award of $26 million for the "taking" of Western Shoshone lands.

On July 26, 1980, the Bureau of Indian Affairs, as part of its effort to develop a monetary distribution plan, held a hearing of record in Western Shoshone country. Over 80% of the Western Shoshones who testified (many of whom spoke in Shoshone) opposed the monetary distribution, denounced the Indian Claims Commission claim, and called for the Western Shoshone Nation to refuse the monetary award.

During this hearing of record, a Western Shoshone elder asked the specific question of the federal hearing officer, "By what law did the United States acquire Western Shoshone

territory?" The hearing officer, Interior Solicitor Bruce McConkie, had no answer to this question, and remained mute. The elder then said, "Keep your money until you can answer the question of how the U.S. acquired Western Shoshone territory. I reject the award." Thereafter each Western Shoshone person who testified asked the same question of the hearing officer, and when he couldn't answer the question, also rejected the claim.

Because of such massive Western Shoshone opposition to the monetary award (also based in large part on the argument that "Mother Earth is not for sale"), it became readily apparent to the BIA that it would not be able to complete a distribution plan within the six months required by the Indian Tribal Judgment Funds Use or Distribution Act (Pub.L. 93-134, section 1, October 19, 1973). The BIA asked the Senate Select Committee on Indian Affairs for an extension, but the Committee turned down the request, thus leaving the entire case unresolved, where it remains at this time.